STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 16, 2008
v	No. 277554 Bay Circuit Court
CLOIS ANTHONY BELL, Defendant-Appellant.	LC Nos. 06-010684-FH 06-010766-FH 06-010767-FH 06-011123-FH

Before: Hoekstra, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of possession of a controlled substance less than 25 grams, MCL 333.7403(2)(a)(v), two counts of conspiracy to deliver a controlled substance less than 50 grams, MCL 750.157a and MCL 333.7401(2)(a)(iv), two counts of delivery of a controlled substance less than 50 grams, MCL 333.7401(2)(a)(iv), and one count of conducting a criminal enterprise, MCL 750.159i(1). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 34 to 180 months for possession of a controlled substance, 76 to 240 months for each count of conspiracy to deliver a controlled substance, 114 to 240 months for each count of delivery of a controlled substance, and 260 to 480 months for conducting a criminal enterprise. Defendant appeals as of right his convictions and sentences. Because we conclude that defendant's convictions are supported by sufficient evidence, defendant's conspiracy convictions do not violate Wharton's rule, defendant's convictions for delivery of a controlled substance are not necessarily included lesser offenses of conducting a criminal enterprise, and the trial court did not abuse its discretion in admitting the out-of-court statement of defendant's coconspirator, commit plain error in instructing the jury, or abuse its discretion in sentencing defendant, we affirm.

I

Defendant claims that his conspiracy convictions and his conviction for conducting a criminal enterprise are not supported by sufficient evidence. We review de novo whether sufficient evidence was presented at trial to sustain a criminal conviction, viewing the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could

have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007).

A

According to defendant, his conspiracy convictions are not supported by sufficient evidence because the evidence establishes nothing more than a buyer-seller agreement between him and Adolpho Fitchett. We disagree.

"[T]o establish the statutory offense of criminal conspiracy, a prosecutor must show a combination or agreement, express or implied, between two or more persons, to commit an illegal act or to commit a legal act in an illegal manner." *People v Meredith (On Remand)*, 209 Mich App 403, 407-408; 531 NW2d 749 (1995). "[D]irect proof of the conspiracy is not essential; instead, proof may be derived from the circumstances, acts, and conduct of the parties." *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997).

Defendant arranged for Fitchett to stay with Daniel Gonzales. According to Gonzalez, defendant appeared at his house every couple of days to speak with Fitchett. While Gonzalez never saw defendant give any cocaine to Fitchett, Gonzalez "knew that [defendant] was giving it to [Fitchett]," because whenever Gonzalez asked Fitchett for cocaine, Fitchett replied that he would not have any until defendant arrived, and after defendant would leave Gonzales's house, Fitchett would give cocaine to Gonzales. In addition, the police informant testified that on June 21, 2006, and June 27, 2006, he went to Gonzales's home to purchase cocaine from Fitchett. On the first visit, when the informant arrived at Gonzales's home, he and Fitchett waited for defendant to arrive because Fitchett "didn't have anything." After defendant and Fitchett met in private, Fitchett gave the informant the cocaine. On the second visit, when the police informant arrived with $440, Fitchett only had $100 worth of cocaine, but he called defendant and asked defendant to bring over more cocaine. After defendant arrived and met with Fitchett in private, Fitchett gave the remaining cocaine to the informant. Further, money recovered from defendant after his arrest matched the $440 the police informant used to purchase the cocaine on June 27, 2006.

Viewing this evidence in the light most favorable to the prosecution, *Taylor, supra*, a rational trier of fact could have found beyond a reasonable doubt that defendant and Fitchett conspired to deliver cocaine on these two occasions. Defendant arranged for Fitchett to live with Gonzalez, and defendant supplied Fitchett with the cocaine Fitchett sold to the police informant while the informant waited in a separate room in Gonzalez's house. Accordingly, defendant's convictions for conspiracy are supported by sufficient evidence.

We also reject defendant's argument that his conspiracy convictions violate Wharton's rule. Wharton's rule limits the scope of the crime of conspiracy by providing that "[a]n agreement to commit a particular crime cannot be prosecuted as a conspiracy where the number of alleged conspirators do not exceed the minimum number of persons logically necessary to complete the substantive offense." *People v Blume*, 443 Mich 476, 482 n 11; 505 NW2d 843 (1993). Because delivery of a controlled substance necessarily requires a minimum of two persons, there can be no prosecution for conspiracy where only the buyer and the seller are involved. *Id.* However, given the participation of the police informant, defendant and Fitchett

were not the only parties involved in the drug transactions. Thus, defendant's conspiracy convictions do not violate Wharton's rule.

B

Defendant argues that his conviction for conducting a criminal enterprise is not supported by sufficient evidence because the evidence presented did not establish that the predicate offenses were for the purpose of financial gain or comprised a pattern of racketeering activity.

MCL 750.159i(1) states:

> A person employed by, or associated with, an enterprise shall not knowingly conduct or participate in the affairs of the enterprise directly or indirectly through a pattern of racketeering activity.

MCL 750.159g defines "racketeering" in pertinent as:

> [C]ommitting, attempting to commit, conspiring to commit . . . an offense for financial gain, involving any of the following:
>
> * * *
>
> (c) A felony violation of . . . MCL 333.7401 to 333.7461 . . . concerning controlled substances . . . .

On June 21, 2006, and June 27, 2006, Fitchett received $480 from the police informant in exchange for the cocaine. Viewing this evidence and the reasonable inferences arising therefrom in the light most favorable to the prosecution, *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000); *Taylor, supra*, a rational trier of fact could have found beyond a reasonable doubt that defendant and Fitchett engaged in the delivery of cocaine to the police informant for a financial gain. The evidence established that the predicate acts were done for the purpose of financial gain.

A "pattern of racketeering activity" means:

> [N]ot less than 2 incidents of racketeering to which all of the following characteristics apply:
>
> (i) The incidents have the same or a substantially similar purpose, result, participant, victim, or method of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated acts.
>
> (ii) The incidents amount to or pose a threat of continued criminal activity.
>
> (iii) At least 1 of the incidents occurred within this state on or after the effective date of the amendatory act that added this section, and the last of the incidents occurred within 10 years after the commission of any prior incident, excluding any period of imprisonment served by a person engaging in the racketeering activity. [MCL 750.159f(c).]

In arguing that the presented evidence did not establish that he engaged in a "pattern of racketeering," defendant relies on the definition of "pattern of racketeering" in the federal RICO statute, 18 USC 1961(5), as interpreted by the United States Supreme Court in *HJ Inc v Northwestern Bell Tel Co*, 492 US 229, 237-243; 109 S Ct 2893; 106 L Ed 2d 195 (1989). However, our Supreme Court has disapproved of the use of federal authorities in construing Michigan's racketeering statute when the language of the statute is unambiguous. *People v Guerra*, 469 Mich 966; 671 NW2d 535 (2003); *People v Gonzalez*, 469 Mich 967; 671 NW2d 536 (2003). Defendant has presented no argument that the concepts of closed- and open-ended continuity, which the United States Supreme Court concluded were contained within the definition of "pattern of racketeering" in the federal RICO statute, *HJ Inc*, *supra* at 239–241, are included within the plain language of the definition of "pattern of racketeering," and specifically within the phrase "[t]he incidents amount to or pose a threat of continued criminal activity." Defendant also has not presented an argument that the phrase "[t]he incidents amount to or pose a threat of continued criminal activity" is ambiguous, which, if accepted, would ostensibly allow us to look at the United Supreme Court's interpretation of the definition of "pattern of racketeering" in the federal RICO statute for guidance. Defendant has, therefore, presented us with no legal basis for concluding that the evidence presented, when viewed in the light most favorable to the prosecution, failed to establish that he did not engage in a pattern of racketeering, and we will not search for authority to sustain defendant's position, *People v Cathey*, 261 Mich App 506, 510; 681 NW2d 661 (2004).

II

Defendant argues that his delivery and conspiracy convictions must be vacated because they are necessarily included lesser offenses of the criminal enterprise conviction. We disagree.

"[T]he predicate offenses of racketeering are not necessarily included lesser offenses of that offense." *People v Martin*, 271 Mich App 280, 296; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008). Defendant recognizes that the Court's decision in *Martin* contradicts his argument, but he argues that *Martin* was wrongly decided. However, the Supreme Court affirmed the Court's holding in *Martin*, *People v Martin*, 482 Mich 851; 752 NW2d 457 (2008), and we are bound by that decision. *People v Metamora Water Service, Inc* 276 Mich App 376, 388; 741 NW2d 61 (2007).

III

Defendant claims the trial court erred by overruling his hearsay objection to testimony by the police informant concerning statements made by Fitchett. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Farquharson*, 274 Mich App 268, 271; 731 NW2d 797 (2007). "[A]n abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *People v Shahideh*, 277 Mich App 111, 118; 743 NW2d 233 (2007).

An out-of-court statement is not hearsay if "[t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy." MRE 801(d)(2)(E). Three things that must be established for a statement to qualify under the exclusion for coconspirator statements:

> First, the proponent must establish by a preponderance of the evidence that a conspiracy existed through independent evidence. . . . Second, the proponent must establish that the statement was made during the course of the conspiracy. . . . Third, the proponent must establish that the statement furthered the conspiracy. [*Martin, supra* at 316-317.]

It is not necessary to show direct proof of the conspiracy where there is sufficient circumstantial evidence present. *Id.* at 317.

Defendant claims there was no proof, absent Fitchett's out-of-court statement that he was waiting on defendant, that a conspiracy existed between him and Fitchett. However, before testifying to Fitchett's statement, the police informant testified:

> An' I called him [Fitchett] up [on June 21, 2006,] an' asked if he had $40 worth of crack cocaine. He said, "Yeah." I went to the house and I waited; and then another person came, who's here, an' I know him as Slim. He came; they went in the back room or the bedroom, one or the other. They came out and gave me the crack, an' I left.

Fitchett subsequently testified that when he went to Gonzalez's house to purchase more cocaine from Fitchett on June 27, 2006, he was only able to purchase $100 worth of cocaine until defendant arrived, and that after defendant met with Fitchett in private, he was able to purchase another $340 worth of cocaine. In addition, there was evidence that defendant arranged for Fitchett to live with Gonzalez. This evidence presented independent proof of a conspiracy between defendant and Fitchett. The trial court did not admit abuse its discretion in admitting Fitchett's out-of-court statement.

Defendant also asserts that the admission of Fitchett's out-of-court statement violated his Sixth Amendment[1] right of confrontation. In support of his argument, defendant cites *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), in which the United States Supreme Court held that the Confrontation Clause prohibits the admission of out-of-court testimonial statements unless the declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination. However, Fitchett's statement was made in the course and in furtherance of the conspiracy and, therefore, by its nature, the statement was nontestimonial. See *id.* at 56. Thus, the admission of Fitchett's out-of-court statement did not violate defendant's right of confrontation.

IV

Defendant asserts the trial court failed to accurately instruct the jury on the elements of conducting a criminal enterprise and conspiracy. Because defendant did not object to the instructions on these grounds below, we review defendant's claims for plain error affecting his substantial rights. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

[1] US Const, Am VI.

In regard to the trial court's instructions on the elements of conducting a criminal enterprise, defendant argues the trial court failed to instruct the jury that the predicate acts must have been committed for financial gain and failed to instruct the jury on the "continuity" element of the offense. We reject both of defendant's assertions. First, the trial court did specify that financial gain is an element of conducting a criminal enterprise. Second, defendant's argument that the trial court failed to instruct the jury on the "continuity" element is based on the United States Supreme Court's interpretation of "pattern of racketeering" as it appears in the federal RICO statute. As previously stated, defendant has presented no argument that the Supreme Court's interpretation of this phrase in *HJ Inc, supra*, applies to Michigan's racketeering statute. Accordingly, defendant has failed to establish the trial court committed plain error in instructing the jury on the elements of conducting a criminal enterprise.

Similarly, defendant has failed to show that the trial court committed plain error in instructing the jury on the elements of conspiracy. Defendant claims the trial court failed to instruct the jury that to find him guilty of conspiracy, it needed to find that he conspired with Fitchett. However, looking at all the instructions given by the court over the course of trial, see *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997) ("This Court reviews jury instructions in their entirety to determine whether the trial court committed error requiring reversal"), the court's conspiracy instructions were accurate and complete. In its preliminary instructions, the trial court informed the jury that defendant was charged with conspiring with Fitchett to deliver cocaine.

Because defendant has failed to establish the trial court erred when it instructed the jury on the elements of conducting a criminal enterprise and conspiracy, we reject defendant's claim of ineffective assistance of counsel predicated on counsel's failure to object to the instructions below. See *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007) (counsel is not ineffective for failing to make a futile objection).

V

Defendant finally claims the trial court failed to apply it own discretion in imposing sentence, relying instead on the prosecutor's unsupported statements about defendant's lengthy involvement in a drug operation. However, a review of the record establishes that when the trial court stated it agreed with the prosecutor, the trial court was referring to the prosecutor's recommendation that defendant receive minimum sentences near the high end of the sentence range. There is no indication in the record that the trial court, in deciding to sentence defendant to the maximum minimum sentences, relied on the prosecutor's unsupported statements, rather than on the evidence presented at trial and the information contained in the presentence report. Accordingly, defendant has failed to establish the trial court abused its discretion in imposing sentence. *People v Underwood*, 278 Mich App 334, 337; 750 NW2d 612 (2008).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra